Supreme Court of the United States

OCTOBER TERM, 1960

No. 837

HERRIN TRANSPORTATION COMPANY,
Appellant

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SOUTHERN-PLAZA EXPRESS, INC., AND STRICKLAND TRANSPORTATION CO., INC.,
Appellees

Appeal From The United States District Court
For The Southern District of Texas

APPELLEE'S STATEMENT AS TO JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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APPELLEE'S STATEMENT AS TO JURISDICTION AND MOTION TO DISMISS OR AFFIRM

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Appellee Strickland Transportation Co., Inc., respectfully submits herewith its motion to dismiss the appeal as not in accordance with 28 U.S.C.A. §2001(b) and the rules of the court or in the alternative to affirm the judgment of the District Court on the basis that appellant's jurisdictional statement does not present any questions upon which the decision of the cause depends of such substantial nature as to require further argument.

STATEMENT OF THE CASE

By application under Section 207(a) of the Interstate Commerce Act in Docket No. MC 59680 (Sub No. 117), filed June 21, 1954, Appellee Strickland Transportation Co., Inc., hereinafter sometimes called Strickland, sought a Certificate of Public Convenience and Necessity authorizing service as a common carrier of property by motor vehicle of general commodities over regular routes between Houston, Texas, and New Orleans, Louisiana, over two routes (1) via Beaumont, Texas, and Lafayette, Louisiana, for convenience referred to as the "northern route," and (2) via Beaumont and Baton Rouge, Louisiana, for convenience referred to as the "southern route." Under its prior existing authority Strickland was authorized to provide such service from Houston to Beaumont but not in the reverse direction.

By similar application, filed September 26, 1955, in Docket No. MC 10928 (Sub No. 26) Southern-Plaza Express, Inc., hereinafter sometimes called Southern-Plaza, sought similar authority to operate over the "southern route" only between Houston and New Orleans.

Following extensive oral hearings before the Commission, conducted by a qualified hearing examiner, the examiner by a single report and recommended order, served October 1957, recommended denial of both applications. Exceptions and replies thereto were duly filed and in accordance with usual procedure the matter came before Division 1 of the Com-

mission which by memorandum, dated July 23, 1958, certified the proceedings to the entire Commission for consideration.

By an extensive written report, reproduced in 77 M.C.C. 655, decided October 14, 1958, the entire Commission granted authority to Strickland over the "northern route" and to Southern-Plaza over the "southern route." Petitions for reconsideration and replies thereto were filed by the parties including appellant and appellee Strickland. In April, 1959, the Commission by an order stating in substance that it believed its previous report and order to be in accordance with the pertinent facts and applicable law denied the petitions for reconsideration thus affirming its previous action.

Appellant and another carrier, not present here on appeal, then commenced the instant cause by suit to set aside the order of the Commission in the United States District Court for the Southern District of Texas. By opinion filed August 1, 1960, 187 F. Supp. 777, the District Court rendered judgment affirming the questioned Commission order in part and remanding it in part for further consistent proceedings before the Commission.

While the cause is one which otherwise would be reviewable by the Supreme Court on direct appeal from the District Court, appellee asserts that the notice of the appeal was not timely filed and that there has been no showing by appellant that the questions involved are of such substantial nature as to need further argument, and such have been so plainly fore-

closed by the decisions of the Supreme Court as to warrant the Court in summarily disposing of the appeal at this stage of the proceeding.

I.

THE APPEAL IS NOT TIMELY TAKEN

Following the filing of the opinion of the District Court on August 1, 1960, appellant gave notice of appeal in that court on January 20, 1961. It is the position of this appellee that such was not timely notice of appeal because the opinion of the District Court filed August 1, 1960, constituted a final judgment in the case and that the subsequent entry of a formal judgment on November 28, 1960 could not constitute a second final judgment in the case nor extend the time to appeal.

28 U.S.C.A. §2101(b) governs the filing of notice of appeal in the instant cause and it provides:

> "(b) Any other direct appeal to the Supreme Court which is authorized by law from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final."

Decision of the question of the timeliness of appellant's notice of appeal in the lower court turns on the question of finality of the opinion of the District Court filed August 1, 1960. The question is squarely resolved in *Erstling v. Southern Bell Telephone and Telegraph Company*, 255 F. 2d 93 (5th Cir.—1958).

In that case appellant had instituted suit in a Florida Court which appellee removed to the United States District Court and filed motion to dismiss for failure to state a claim upon which relief could be granted under Rule 12(b)(6) Federal Rules of Civil Procedure. The District Court granted the motion by order dated July 11, 1957, noted in the Clerk's docket, the operative words of which were:

> "Ordered and Adjudged that the Plaintiff's Complaint be and is hereby dismissed. The Plaintiff declining to plead further, this Order is made with prejudice to the Plaintiff."

On July 25, 1957, an instrument styled "Final Judgment" was signed by the district judge providing:

> "Ordered and Adjudged that the Plaintiff, Julius H. Erstling, take nothing by his suit and the Defendant, Southern Bell Telephone and Telegraph Company, go hence without day and recover its costs in this suit incurred, said costs to be taxed by the Clerk of the Court."

Appellant filed notice of appeal on August 20, 1957, and appellee moved to dismiss as filed too late. While the case deals with appeal to a Circuit Court of Appeals from a District Court, nevertheless, it constitutes square precedent on the question of finality of the District Court order for purposes of computation of time within which to give timely notice of appeal. On this question the Court held on page 95:

> "A recent decision of the Supreme Court has supplied the answers to the questions posed by the motion to dismiss the appeal. *United States v.*

F. & M. Schaefer Brewing Co., 78 S. Ct. 674. No form of words is necessary to evidence the rendition of a judgment. If the language used by the court clearly evidences the judge's intention that it shall be his final act it constitutes a final judgment, and when such intention has been so evidenced and the docket entry has been made a final judgment has been pronounced and entered and the time to appeal starts to run." The later filing and entry of a more formal judgment could not constitute a second final judgment in the case nor extend the time to appeal. Such are the principles applicable here as announced in the *Schaefer* opinion.

"In the case before us one of the instruments is styled 'Order' and the other is called 'Judgment.' But as has been noticed, the label is unimportant. In each the operative words are 'Ordered and Adjudged.' In form the 'order' dismisses the plaintiff's complaint with prejudice and the 'judgment' directs that the plaintiff take nothing by his suit and that the defendant go hence without day. The instrument styled 'order' was a direction of the court that 'all relief be denied' and upon the notation thereof in the civil docket, under Rules 58 and 79(a), became a judgment. In any event the legal effect of the language in each of the instruments is the same and either would put an end to the suit. The only difference in the effect of the two instruments is that the one called 'judgment' provides for recovery of costs by the defendant. But an award of costs to be taxed is not of the substance of a judgment where there is a dismissal for failure to state a claim upon which relief may be granted, and since costs are allowed as a matter of course unless the court otherwise directs, Rule 54(d), Fed. Rules Civ. Proc. 28 U.S.C.A., this provision was surplusage.

> "We reach the conclusion that the 'Order' dated July 11, 1957, and entered by the docket notation on July 12, 1957, became a final and appealable judgment when so entered. Hence the appeal of which notice was filed on August 20, 1957, was after the time for appeal had expired and the appeal must be dismissed."

Another excellent discussion of this problem is made in *F.T.C. v. Minneapolis-Honeywell Co.*, 344 U. S. 206. This cause arose out of a proceeding by the F. T. C. wherein a three count complaint was issued against respondent. Following protracted proceedings before the Commission a cease and desist order was issued on all three counts. Respondent petitioned the Court of Appeals for review and by cross-petition the Commission contended for enforcement of all parts of its order, whereupon respondent abandoned its attack on Parts I and II of the order. On July 5, 1951, the court set aside Part III of the order dismissing the complaint upon which it was based. No petition for rehearing was filed and a certified copy of the judgment was issued in lieu of a mandate. Thereafter the Commission filed a memorandum with the court pointing out that no reference was made in the judgment to Parts I and II of the complaint and since no relief had been sought therefrom the court should enter a decree affirming the cease and desist order as to these parts. On September 18, 1951, the court did this by an instrument labeled "Final Decree," wherein its holding with respect to Part III was reiterated. On December 14, 1951, the Commission filed petition for writ of certiorari which was not timely filed unless the 90-day filing period ran from the September 18,

1951, order. The court held that it did not, stating on pages 211-212:

> "Thus, the mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought.[9] Only when a lower court changes matters of substance,[10] or resolves a genuine ambiguity,[11] in a judgment previously rendered should the period within which the appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order has disturbed or revised legal rights and obligations which, by its prior judgment had been plainly and properly settled with finality.[12]"

On page 212 the court continues:

> "Indeed, the judgment of July 5 was for all purposes final. It put to rest the questions which the parties had litigated in the Court of Appeals.

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[9] *Department of Banking v. Pink*, 317 U.S. 264; *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1923); *Credit Co., Ltd. v. Arkansas Central R. Co.*, 128 U. S. 258 (1888).

[10] *Zimmern v. United States*, 298 U. S. 167, 169 (1936); Compare *Department of Banking v. Pink*, supra.

[11] Compare *Federal Power Commission v. Idaho Power Co.*, 344 U. S. 17 (1952).

[12] Compare *Rubber Co. v. Goodyear*, 6 Wall. 153 (1868) (appeal allowed from second decree, restating most provisions of the first because the first decree, at the time of entry, was only regarded by the parties and the court as tentative); *Memphis v. Brown*, 94 U. S. 715 (1877) (appeal allowed from second judgment on ground that the second made material changes in the first). See *United States v. Hack*, 320 U. S. 531, 533-534 (1944); *Hill v. Howes*, 320 U. S. 520, 523 (1944).

It was neither 'tentative, informal nor incomplete.'"

On page 213, after noting that there must be an end to litigation the court stated:

"It is a principal reflected in the statutes which limit our appellate jurisdiction to those cases where review is sought within a prescribed period. Those statutes are not to be applied so as to permit a tolling of their time limitations because some event occurred in the lower court after judgment was rendered which is of no import to the matters dealt with on review."

Comparison should be made between the final paragraph of the extensive August 1, 1960 opinion filed by the court in this cause and the judgment rendered November 28, 1960 by the court. The former reads:

"Accordingly, the order is affirmed in part and set aside in part. Insofar as the order is set aside, the matter is remanded to the Commission for further consistent proceedings.

"AFFIRMED IN PART, REMANDED IN PART."

The latter reads:

"JUDGMENT

"BE IT REMEMBERED, that on September 22, 1959, came on for trial the above entitled and numbered cause, and thereafter, on August 1, 1960, the court filed its opinion in said cause and does hereby render judgment as follows:

See *Dickinson v. Petroleum Conversion Corp.*, 338 U. S. 507, 514 (1950)

> 'Accordingly, the order is affirmed in part and set aside in part. Insofar as the order is set aside the matter is remanded to the Commission for further consistent proceedings.
>
> 'AFFIRMED IN PART, REMANDED IN PART'."

From the foregoing and the cases noted it is clear that the opinion filed August 1, 1960 left nothing further to be done, that it was directed to all the issues litigated by the parties, that the judgment entered November 28, 1960, in no way disturbed or revised any legal obligations or rights adjudicated theretofore, that the opinion filed August 1, 1960, in no way purports to be tentative, informal or incomplete, that the operative words in both instruments are the same and in either case are sufficient to end the litigation, and that the later formally styled judgment is a later event of no import to the matters to be dealt with on review. Thus, the November 28, 1960 judgment did not toll the running of the time within which to give notice of appeal, and appellant has not given such timely notice in the court below.

That such failure to give timely notice is grounds for dismissal of the appeal is well-settled. See *Whitsitt v. Union Depot, etc. Co.*, 7 S. Ct. 1248, 122 U. S. 363, 30 L. Ed. 1150; *Collard v. Pittsburgh, etc. R. Co.*, 38 S. Ct. 336, 246 U. S. 653, 62 L. Ed. 922; *Glasgow Nav. Co. v. Munson Steamship Line*, 38 S Ct. 215, 246 U. S. 647, 62 L. Ed. 919.

II.

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

Initially it must be pointed out that the jurisdictional statement of appellant does not raise the question of the substantiality of the evidence supporting the involved Commission order. In addition the jurisdictional statement contains no specification of prejudice caused by the alleged procedural defects complained of by appellant. Thus, as we understand appellant's position, it is that the Commission's handling of these proceedings on review constituted fundamental error as a denial of "due process."

A. Certification to the Commission

Following the examiner's report and recommended order and exceptions and replies thereto by the parties, Division 1, to whom such proceedings are normally referred, certified the proceedings to the Commission by vote recorded in a memorandum to Director Coyle. Appellant questions the propriety of the failure of the division to publish a report, that the Interstate Commerce Act, 49 U.S.C.A. §17, or the organizational rules of the Commission provide for such certification, the validity of the vote of the division to certify as not in accordance with the provisions of the Interstate Commerce Act, and the validity of the Commission's action as depriving appellant of a favorable report, or, if unfavorable, the opportunity to petition

for reconsideration with additional briefs pointing out the errors in the division report.

With respect to the first two questions raised in the jurisdictional statement, as noted above, the Interstate Commerce Act, 49 U.S.C.A. §17(1) provides:

> "(1) The Commission is authorized by its order to divide the members thereof into as many divisions (each to consist of not less than three members) as it may deem necessary, which may be changed from time to time. Such divisions shall be designated, respectively, division one, division two, and so forth, or by a term descriptive of the principal subject, work, business, or function assigned or referred to such divisions. . . ."

Further, the Act, 49 U.S.C.A. §17(4) provides:

> "(4) A division, an individual Commissioner, or a board shall have authority to hear and determine, order, certify, report, or otherwise act as to any work, business, or functions assigned or referred thereto under the provisions of this section, and with respect thereto shall have all the jurisdiction and powers conferred by law upon the Commission, and be subject to the same duties and obligations. . ."

Pursuant to which the organizational rules of the Commission in §2.3, 23 F.R. 1747, 1748, provide:

> "2.3 Each division with regard to any case or matter assigned to it, or any questions brought to it under this delegation of duty and authority, may call upon the whole Commission for advice and counsel, or for consideration of any case or question by an additional Commissioner or Com-

missioners assigned thereto; and the Commission may recall and bring before it as such any case, matter or question so allotted or assigned and may either dispose of such case, matter, or question itself, or may assign or refer the matter to the same or another division."

Whether the questioned certification in this case is viewed as (1) a request for advice and counsel, (2) the assignment of additional commissioners, or (3) amounting to recall by the Commission through its acceptance of the certification, such action certainly is provided for in the Act and the Commission's organizational rules and complies substantially and in spirit therewith.

On the basis of section 17(3) of the Act, 49 U.S. C.A. §17(3) providing, ". . . Every vote and official act of the Commission, or any division . . . . shall be entered of record, and such record made public upon request of any interested party," appellant challenges the propriety of the vote to certify of the division, recorded by memorandum to Director Coyle, as to which no minute entry was made. The purpose of this provision is to insure adequate knowledge of the parties of official acts which substantially affect their rights. No right to complain or to complain by a certain time was lost to appellant by this action, nor could appellant have in any way opposed recall by the Commission. Thus, how failure to make a minute entry to record the vote of Division 1 to certify the case to the Commission could have resulted in prejudice to appellant is difficult to conceive.

With respect to appellant's contentions concerning

being deprived of a favorable report or the opportunity to petition for reconsideration of an unfavorable report, it is likewise difficult to conceive of how appellant could have been prejudiced by the failure of Division 1 to publish a report as its action resulted in consideration by the Commission and appellant was not deprived of the opportunity to petition for reconsideration with additional briefs, which, in fact, it did.

Appellant's contentions as to the foregoing fail to recognize that these are matters of orderly internal procedure within the Commission, do not require any action by the parties to preserve their rights, and that the rules and statutes clearly contemplate consideration by the entire Commission whenever in its estimation such will best conduce to the proper dispatch of business and the ends of justice. As the jurisdictional statement fails to specify in what respects these alleged procedural defects were prejudicial to it the action of the Commission must stand. As provided in section 10(e) of the Administrative Procedure Act, 5 U.S.C.A. §1009(e), "due account shall be taken of the rule of prejudicial error." See *ABC Freight Forwarding Corp. v. United States*, 169 F. Supp. 403 (S. D. N. Y.—1959), which cites *Market Street Railway v. Commission*, 324 U. S. 561 (S. Ct.—1945).

B. **Notation Voting**

Appellant challenges the validity of the final report of the Commission, 77 M.C.C. 655, on the basis that it was adopted through the procedure of notation voting by the Commission in "constructive session" rather than at a formal session with the members of

the Commission physically present. In the alternative this method of adoption of the report by the Commission is challenged on the basis it was never published in the Federal Register.

While Section 17(3) of the Interstate Commerce Act, 49 U.S.C.A. §17(3), imposes a quorum requirement in order to transact business at formal sessions, there is no express provision in the Act requiring that action be taken only at formal sessions. Further, in the same section it is provided that "the Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice. . ." In view of the heavy work load and the broad grant of authority contained in the Interstate Commerce Act for the Commission to control its proceedings, in the absence of an express statutory requirement of formal sessions the courts should be hesitant to impose one as such is again a matter of internal procedure within the Commission. In any event there is no basis for reversal of the Commission's action on this account, as any defect in this regard was cured when the full Commission, all members physically present, voted to deny appellant's petition for reconsideration affirming the findings of the report.

Nor is the notation voting procedure, if otherwise valid, rendered invalid due to the failure of the Commission to publish such a procedure in the Federal Register. The minute authorizing such is contained in the official record of the Commission having been adopted at formal session October 2, 1953, all members present, and reads as follows:

"3. CONSTRUCTIVE SESSIONS: ACTION BY NOTATION

"(A) At other than regular or special conferences official action may be taken by the Commission, by any division thereof, or by any board or employees set up under Section 17 of the Interstate Commerce Act, in this purpose (1) a copy of the report, order, or any other document under consideration may be used as a manuscript on which each Commissioner or board member will indicate his vote, or (2) each Commissioner or board member may cast his vote by separate memorandum. In such instances, the participating Commissioners or board members may informally confer, respectively, with one another or exchange their views in writing. If the votes are cast on different days, the date of decision shall be the date upon which the last individual vote is cast. If, before the votes of all others participating in the voting have been cast, any Commissioner or board member shall request, in writing, conference consideration, or if in the judgment of the Commissioner or board member through whose office the votes are to be cleared undue delay in the voting occurs, the subject matter will be transferred to an appropriate conference agenda.

"(B) The vote by memorandum of each Commissioner or board member on a matter circulated for action by notation shall be sent to the Commissioner or board member through whose office the matter is to be cleared. Copies of such vote need not be circulated to the other Commissioners or board members unless it explains the reason for the vote. A copy of the clearance memorandum, however, shall be sent to each Commissioner or board member."

This procedure falls within one of the specific exemptions from publication under section 3 of the Administrative Procedure Act, 5 U.S.C.A. §1001, exempting "any matter relating solely to the internal management of an agency," and the last sentence of section 3(a) of the Administrative Procedure Act, 5 U.S.C.A. §1002(a), clearly protects the parties from such, "no person shall in any manner be required to resort to organization or procedure not so published." The voting procedure was not adopted for the guidance of the parties and compels no action on their parts to secure review or protect their rights. Thus, the voting procedure as an internal matter of the Commission affords appellant no basis for complaint due to its lack of publication. As stated in *Foreman & Clark, Inc. v. NLRB*, 215 F. 2d 396 (9th Cir.—1954); cert. denied 348 U. S. 887, at page 410:

> "The clear purpose of section 3(a) . . . is to provide a *shield* for a petitioner before . . . (an) agency to protect him from being penalized for failing to resort to unpublished methods of procedure. It is not a *sword* by which a petitioner can strike down the agency's order on the ground that the agency *has not authorized itself* to issue that type of order, by publishing a statement in the Federal Register!"

C. **The Use of Attorney-Advisors**

Appellant seeks to raise in this case the question of whether the Administrative Procedure Act, 5 U.S.C.A. §1001, et seq., applies to the "intermediate review" stage of proceedings before the Interstate Commerce Commission by challenging the use of attorney-

advisors by the Commission in the consideration of proceedings before it. Initially it must be pointed out that this question is not properly present for review by the courts at all as appellant entirely failed to raise it before the Commission. In *United States v. Tucker Truck Lines*, 334 U. S. 33, 37, it is stated:

> "Orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts."

The foregoing is required even though the Commission would be compelled to reject such contentions as simple fairness to the Commission requires it be given opportunity to consider the matter and to present reasons justifying the action. Further, the courts are entitled to a full prior consideration and explanation by the Commission. As stated in the case cited above at page 36:

> "This issue is clearly an afterthought, brought forward at the last possible moment to undo the administrative proceedings without consideration of the merits."

Assuming the point properly raised, for the sake of argument, the Commission defends the practice of using attorney-advisors as necessary and points out that such are not used in investigating or prosecuting functions of the Commission nor do they take part in hearings before the hearing examiner.

Appellant's contention that this method of review is violative of the Administrative Procedure Act is

predicated upon sections 7 and 8 (b) thereof. The fallacy of the contention is readily apparent in that section 7 provides for a qualified examiner at the stage of taking evidence and, according to the practice, writing of the initial, tentative or recommended decision.

The applicable part of section 7 reads:

> "Sec. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—
>
> "(a) Presiding Officers. — *There shall preside at the taking of evidence* (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this act; . . . ." (Emphasis ours)

Likewise, the portion of section 8(b) relied upon fails to support appellant's contention. It provides:

> "(b) **Submittals and Decisions.** Prior to each recommended, initial, or tentative decision, or *decision upon agency review of the decision of subordinate officers* the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions or subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. . ." (Emphasis ours)

Thus, under appellant's contention the attorney-advisor's recommendation following review of the record at the intermediate state is a "recommended decision"

under this provision. Such was clearly not contemplated by the Act as reference to other sections reveals. The section only purports to deal with decisions. Until adopted by the division or the Commission, the attorney-advisor's work product is not any sort of "decision." The recommended decision referred to in the Act, in this instance, is the report and recommended order of the hearing examiner.

The use of attorney-advisors was judicially approved prior to the Administrative Procedure Act. See the first, second and fourth *Morgan* cases, 298 U. S. 468; 304 U. S. 1, 18; 313 U. S. 409, 422; and *Norris & Hirschberg v. SEC*, 163 F. 2d 160, 163, cert. denied 333 U. S. 867. It is not to be supposed that the Administrative Procedure Act was intended to do away with their use as provision was made therein to specifically regulate their activities by prohibiting their participation in investigation and prosecution functions under section 5(c) of Administrative Procedure Act, 5 U.S.C.A. §1004(c):

> "No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate to advise in the decision, recommended decision, or *agency review* . . . except as witness or counsel in public proceedings." (Emphasis ours).

As can readily be seen agency review, the "intermediate stage" is clearly distinguished in the Act from decisions or recommended decisions. Thus, of tremendous significance is the omission of any reference to agency review in section 8(b) except as to *decision* on

agency review of the *decision* of a subordinate. Likewise, of great significance is the omission of any prohibition of staff assistant participation except as to investigation and prosecution functions, and in such prohibition the participation of these staff assistants or attorney-advisors was expressly prohibited as to *any participation.*

D. Lack of Subsidiary Findings In the Order Overruling The Petition for Reconsideration

While the jurisdictional statement enumerates as a question raised on appeal the failure of the Commission to make any subsidiary findings in its order overruling the petition for reconsideration, no discussion with respect to the point is made therein. Nevertheless, this question is clearly foreclosed against appellant, and need not be dwelt upon. As held by the court below the Administrative Procedure Act does not require reiteration of detailed findings with supporting reasons previously made when the agency's previous action is adhered to on attack by the parties. The Commission's order denying the petition in April 1959, ". . . for the reason that the findings of the Commission are in accordance with the evidence and the applicable law," is obviously merely a reiteration of its previously made detailed findings. It is only where the agency changes its mind at that stage that subsidiary findings supporting the action would be required.

CONCLUSION

Appellee, Strickland Transportation Co., Inc., respectfully submits that notice of appeal has not been

timely given in this case, and, further, that the questions upon which the decision of this cause depend are so insubstantial as not to require further argument.

WHEREFORE, premises considered, appellee respectfully moves the Court to dismiss this appeal, or in the alternative, to affirm the judgment of the court below.

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April 13, 1961

CERTIFICATE OF SERVICE

I, Ewell H. Muse, Jr., Attorney for Appellee, Strickland Transportation Co., Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served a copy of the foregoing Motion To Dismiss Or Affirm on the several parties to this action as follows:

1. On Appellant, Herrin Transportation Company, by mailing copies in duly addressed envelopes, with first class postage prepaid, to its attorneys of record, to-wit: Mr. Carl L. Phinney and Mr. Leroy Hallman, Phinney, Hallman and Pulley, 617 First National Bank Building, Dallas, Texas.

2. On Plaintiff, T.S.C. Motor Freight Lines, Inc., by mailing copies in duly addressed envelopes, with first class postage prepaid, to its attorneys of record, to-wit: Mr. Reagan Sayers, Century Life Building, Fort Worth, Texas, and Mr. Jack Binion, Butler, Binion, Rice and Cook, Gulf Building, Houston, Texas.

3. On Intervening Plaintiffs, Central Freight Lines, Inc. and East Texas Motor Freight Lines, Inc., by mailing copies, in duly addressed envelopes, with first class postage prepaid, to their attorneys of record, to-wit: Mr. Phillip Robinson, Robinson and Starnes, 401 Perry Brooks Building, Austin, Texas, and Mr. A. J. Watkins, Baker, Botts, Andrews and Shepherd, 1600 Esperson Building, Houston, Texas.

4. On Defendant United States, by mailing copies in duly addressed envelopes, with air mail postage

prepaid to its attorneys of record, to-wit: Mr. Roger A. Clark, Department of Justice, Washington 25, D. C., Mr. Robert A. Bicks, Acting Assistant Attorney General, Washington 25, D. C., and Mr. William D. Butler, United States Attorney, Southern District of Texas, 218 Main Post Office Building, Houston, Texas.

5. On Defendant Interstate Commerce Commission, by mailing copies in duly addressed envelopes, with air mail postage prepaid to its attorneys of record, to-wit: Mr. Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington 25, D. C., and Mr. James Y. Piper, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.

6. On Defendant Southern-Plaza Express, Inc., by mailing copies in duly addressed envelopes, with air mail postage prepaid, to its attorneys of record, to-wit: Mr. Clarence D. Todd, Todd, Dillon and Singer, 1825 Jefferson Place, N. W., Washington 6, D. C., Mr. Dwight H. Austin, Liddell, Austin, Dawson and Huggins, Gulf Building, Houston 2, Texas, and Mr. Charles F. Riddle, Todd, Dillon and Singer, 1825 Jefferson Place, N. W., Washington 6, D. C.

DATED THIS THE 10th day of April, 1961.

EWELL H. MUSE, JR.
VAN THOMPSON, JR.
415 Perry Brooks Building
Austin, Texas
Attorneys for Appellee Strickland Transportation Co., Inc.